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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 697

RIN 0648-XV136

Atlantic Coastal Fisheries Cooperative Management Act Provisions; Atlantic Menhaden Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notification of determination of non-compliance; declaration of a moratorium.

SUMMARY: In accordance with the Atlantic Coastal Fisheries Cooperative Management Act (Atlantic Coastal Act), the Secretary of Commerce (Secretary) has determined that the Commonwealth of Virginia has failed to carry out its responsibilities under the Atlantic States Marine Fisheries Commission's (Commission) Interstate Fishery Management Plan (ISFMP) for Atlantic Menhaden and that the measure Virginia has failed to implement and enforce is necessary for the conservation of the Atlantic menhaden resource. This determination is consistent with the findings of the Commission on October 31, 2019. Pursuant to the Atlantic Coastal Act, a Federal moratorium on fishing for Atlantic menhaden in Virginia state waters and possession and landing of Atlantic menhaden harvested in Virginia State waters is hereby declared and will be effective on June 17, 2020. The moratorium will be terminated when the Commission notifies the Secretary that Virginia is found to have come back into compliance with the Commission's ISFMP for Atlantic menhaden.

DATES: June 17, 2020.

FOR FURTHER INFORMATION CONTACT: Derek Orner, Fishery Management

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SUPPLEMENTARY INFORMATION:

Non-Compliance Statutory Background

The Atlantic Coastal Act, 16 U.S.C. 5101 *et seq.*, sets forth a non-compliance review and determination process that is triggered when the Commission finds that a State has not implemented measures specified in an ISFMP and refers that determination to the Secretary for review and potential concurrence.

The Atlantic Coastal Act's non-compliance process involves two stages of decision-making. In the first stage, the Secretary must make two findings: 1) whether the State in question has failed to carry out its responsibility under the Commission ISFMP; and if so 2) whether the measures that the State failed to implement and enforce are necessary for the conservation of the fishery in question. These initial findings must be made within 30 days after receipt of the Commission's non-compliance referral and consequently, this first stage of decision-making is referred to as the 30-Day Determination.

A positive 30-Day Determination triggers the second stage of Atlantic Coastal Act non-compliance decision-making, which occurs contemporaneous with the first decision. That is, if the Secretary determines non-compliance in the first stage, the Atlantic Coastal Act mandates that a moratorium on fishing in State waters in the fishery in question occur. The timing of the moratorium, however, is at the discretion of the Secretary, so long as it is implemented within six (6) months of the 30-Day Determination. In other words, although the implementation of the moratorium is non-discretionary, the Secretary has the discretion to decide when the moratorium will be implemented subject to the Atlantic Coastal Act's six (6) month deadline.

Commission Referral of Non-Compliance

On October 31, 2019, the Commission found that the Commonwealth of Virginia is out of compliance with the Commission's ISFMP for Atlantic menhaden. Specifically, the Commission required Virginia to implement a total allowable harvest from the Chesapeake Bay Reduction Fishery that would not exceed 51,000 mt. Amendment 3 was approved in the fall 2017, and was to be fully implemented by the Commonwealth of Virginia for the 2018 fishing season. Virginia, however, did not implement the Commission's recommended 51,000 mt cap and instead maintained its pre-existing 87,216 mt cap and in 2019, the Reduction Fishery exceeded the Commission's Bay cap by approximately 15,000 mt (or about 30 percent). The Virginia delegation to the Commission agreed it was out of compliance and voted for a non-compliance finding at the Commission's Atlantic Menhaden and Policy Boards as well as the Commission's Business Section. On October 31, 2019, the Commission found the Commonwealth of Virginia out of compliance for not fully and effectively implementing and enforcing the Amendment 3 measures.

Agency Action In Response to Commission Non-Compliance Referral

The Commission forwarded its finding of their October 31st vote in a formal non-compliance referral letter that the Secretary received November 15, 2019. In response to receipt of this letter, the Secretary began the Atlantic Coastal Act's 30-day determination clock. On November 19, 2019, NMFS sent letters to the Commonwealth of Virginia, the New England Fishery Management Council, Mid-Atlantic Fishery Management Council, South Atlantic Fishery Management Council, the U.S. Fish and Wildlife Service, and to the Commission, advising them of the Atlantic Coastal Act's non-compliance process, inviting them to provide commentary on the issues, and in the case of Virginia, inviting the Commonwealth to meet with the agency to present its position in person or provide written comments on the Commission's

findings. NMFS also advised the public of the referral in a Federal Register notice dated November 29, 2019 (84 FR 65787).

On November 22, 2019, Matthew Strickler, Secretary Virginia Natural Resources, other Virginia staff, and NMFS staff met via a conference call. During this meeting, the Commonwealth of Virginia agreed that Virginia was out of compliance and that it did not contest the conservation necessity of the Commission's Atlantic menhaden measures. Virginia described its legal and regulatory framework for its menhaden fishery and confirmed its intent to pursue legislation to comply with the measures identified in Amendment 3 as soon as feasible. Specifically, Virginia representatives stated that the Atlantic menhaden fishery is managed through the Virginia legislature, which does not provide the Virginia Marine Resources Commission (VMRC) the regulatory authority to manage menhaden fisheries.

The Secretary received numerous comments in response to the referral of non-compliance. Omega Protein along with 6 members of the Virginia legislature and one Congressman, and several others oppose the non-compliance finding. Other stakeholders, including the Commission, the Fishery Management Councils, Atlantic Coastal states, nine East Coast Governors, recreational fishing groups, Non-Governmental Organizations and numerous members of the public (~12,000 signatures), strongly support a non-compliance finding due to the scientific research supporting the importance of menhaden to the Bay ecosystem.

Agency's Findings

The Secretary's finding in this matter supports a positive 30-Day Determination of non-compliance. Specifically, the facts and best available science suggest both that Virginia did not fulfill its responsibilities under the Commission's ISFMP and that the measures that Virginia failed to implement are necessary to the conservation of Atlantic menhaden. Virginia concurs

that the involved measures are necessary for conservation. Specifically, in voting itself out of compliance three separate times at the Commission in October 2019, Virginia admitted that failure to implement the measures would jeopardize the conservation of Atlantic menhaden. Virginia also admitted to such in its November 20, 2019 letter and during its November 22, 2019 hearing with NMFS. NMFS' analysis also supports such a finding.

Single Species: Recent studies investigating the contribution of various nursery grounds along the Atlantic coast and their impacts to the coastwide population structure of Atlantic menhaden have indicated that the Chesapeake Bay is considered one of the most important nursery areas for menhaden and contributes approximately 30 percent of new recruits (age 1) to the coastal stock. The implementation of the Chesapeake Bay cap does not limit the coastwide total allowable catch of menhaden for the reduction fishery, but rather attempts to distribute the reduction fishery's catch in order to protect the important Bay nursery area. The science suggests that overharvesting within Chesapeake Bay leads to the removal of smaller, younger age-classes of menhaden that eventually migrate into the older, coastwide population.

In addition, based on the current Commission-adopted benchmarks, the Atlantic menhaden stock status is not overfished and overfishing is not occurring. The stock is currently below the current fishing mortality target and above the current fecundity (measure of productivity) target. The stock is considered a unit stock for management purposes and from this single-species perspective, there is no major concern with total removals and the total Virginia or coastwide quotas have not been exceeded.

Ecosystem Function: The Atlantic Coastal Act requires the Secretary to consider whether the measures that the State failed to implement and enforce are necessary for the conservation of the fishery in question. The fishery in question is the Atlantic menhaden fishery. The statute

defines conservation as restoring, rebuilding, and maintaining of any coastal fishery resource and the marine environment, in order to assure the availability of coastal fishery resources on a long-term basis (16 U.S.C. 5102(4)). Thus, in considering whether the measure is necessary for the “conservation of the fishery in question,” the Secretary is not limited solely to looking at whether the measure preserves the biomass of menhaden but also whether the measure maintains the role of menhaden in the marine environment. Menhaden play an important role as a forage base for a number of other stocks, like striped bass. Those other stocks are part of the marine environment for which menhaden conservation, including the Bay cap, is directed.

In short, the Commission, its member states including Virginia, found that the involved measure is necessary for the conservation of Atlantic menhaden. The Secretary sees the measures Virginia has failed to implement as necessary for the conservation of the menhaden resource. The best available information shows that menhaden in the Chesapeake Bay are an important component of the overall health of the stock, and further that their role as forage for predator species in the Chesapeake Bay is critical to the marine environment. Further, the Secretary notes the degraded status of the Chesapeake Bay and the Commission’s efforts to do its part under its authority to ensure the sustainability of the fisheries in the Chesapeake Bay, specifically by conserving menhaden. Accordingly, the Commission is thus attempting to maintain the menhaden forage base while its scientists study menhaden’s role in the degraded Bay ecosystem and develop ecological reference points. The Secretary agrees with its logic in doing so.

The Atlantic Coastal Act requires that the Secretary declare a moratorium when it finds that a state has failed to carry out its responsibilities and that the measures it failed to implement are necessary for conservation. The Secretary determines that the required moratorium should

begin on June 17, 2020. This moratorium would prohibit fishing for Atlantic menhaden in Virginia State waters, and possession of and landing of Atlantic menhaden harvested in Virginia state waters. A June 17, 2020 implementation date represents the maximum allowed time period to begin a moratorium under the Atlantic Coastal Act. The Secretary analyzed the timing of potential moratoria and believes the June 17, 2020 date is appropriate for two principal reasons. First, although the involved measure is necessary for conservation, the immediacy of that need is less critical given the 2020 fishing season will not begin until spring 2020 and the 51,000 mt Bay cap has never been reached, or even come close to being reached by mid-June. Second, a June closure date will give Virginia the time necessary for its legislature to bring these regulations back into compliance.

Moratorium Prohibitions

The Secretary declares that the moratorium shall be in effect commencing June 17, 2020 and will be based upon the Atlantic Coastal Act's moratorium prohibitions, 16 U.S.C. 5106(e). The moratorium shall make it unlawful to do the following:

- 1) Engage in fishing for menhaden within the waters of Virginia (**NOTE:** under the Atlantic Coastal Act, the definition of "fishing" includes catching, taking or harvesting of fish);
- 2) Land, attempt to land, or possess fish that are caught, taken, or harvested in violation of the moratorium;
- 3) Fail to return to the water immediately, with a minimum of injury, any fish to which the moratorium applies that are taken incidental to fishing for species other than those to which the moratorium applies;
- 4) Refuse to permit any officer authorized to enforce the provisions of this moratorium to board a fishing vessel subject to such person's control for purposes of conducting any search or

inspection in connection with the enforcement of this moratorium;

5) Forcibly assault, resist, oppose, impede, intimidate, or interfere with any such authorized officer in the conduct of any search or inspection under this moratorium;

6) Resist a lawful arrest for any act prohibited by this moratorium;

7) Ship, transport, offer for sale, sell, purchase, import, or have custody, control, or possession of, any fish taken or retained in violation of this moratorium; or

8) Interfere with, delay, or prevent, by any means, the apprehension or arrest of another person, knowing that such other person has committed any act prohibited by this moratorium.

This moratorium will apply to Atlantic menhaden as identified in the Commission's ISFMP and would start June 17, 2020. When the Commission notifies the Secretary that Virginia has come into compliance, the Secretary shall immediately determine whether the State is in compliance, and if so, shall terminate the moratorium.

Classification

This declaration of a moratorium is consistent with the Atlantic Coastal Act at 16 U.S.C. 5106 insofar as Virginia has been found to have failed to carry out its responsibilities under the Commission's Atlantic Menhaden ISFMP and the measures that Virginia has failed to implement and enforce are necessary for the conservation of the Atlantic menhaden fishery. Further, the moratorium prohibits fishing in Virginia State waters and processing and/or landing Atlantic menhaden if harvested in Virginia State waters and is being implemented within six months of the agency findings. The Secretary conducted the Atlantic Coastal Act's non-compliance process by informal adjudication as set forth in the Administrative Procedure Act (APA) at 5 U.S.C. 555. More specifically, the agency gave Virginia prompt notice of the proceeding and an opportunity to meet in person to discuss the matter. Matthew Strickler, Secretary of Virginia's

Natural Resources, and other Virginia staff met with NMFS and NOAA staff on November 22, 2019. Virginia Governor Ralph Northam also provided a letter dated November 20, 2019, to the Secretary stating the management measures as outlined in Amendment 3 are necessary to conserve menhaden and other fisheries that depend on them for survival and that a moratorium is the most appropriate way to bring about a shift to responsible management of Atlantic menhaden in Virginia. Notice and an opportunity for comment were also provided to the New England Fishery Management Council, Mid-Atlantic Fishery Management Council, the South Atlantic Fishery Management Council, the Commission, the U.S. Fish and Wildlife Service, and the Commonwealth of Virginia. NMFS also promptly notified the public of this proceeding in a **Federal Register** notice (84 FR 65787; November 29, 2019). Further, the Secretary is providing Virginia with immediate notice of his findings, which the State will receive prior to actual closure of the fishery, and notifies the public of the Secretary's decision in this **Federal Register** document prior to closure.

Public comment is not required under the Act because the rigid timeline can make it impracticable and would potentially delay mandatory agency action, and also because the issue has been considerably vetted in public forums, such as before the Commission in the months prior to the referral through development of Amendment 3 to the Atlantic menhaden ISFMP. Nevertheless, NMFS did notify the public of this action in its **Federal Register** notice dated November 29, 2019. The agency received approximately 40 comment letters. Four opposed a moratorium while the remaining letters (including more than 12,000 signatures) supported a moratorium.

The declaration of a moratorium does not trigger the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* because the action was not the result of notice

and comment rulemaking under Section 553 of the APA.

The declaration of a moratorium does not fall under review under Executive Order 12866 insofar as the moratorium is not a regulatory action of the agency but is an action mandated by Congress upon the findings of certain conditions precedent set forth in the Atlantic Coastal Act, which also prescribes the nature and extent of the moratorium. This action is required by 16 U.S.C. 5101 and is exempt from review under Executive Order 12866.

The moratorium is not the result of a policy formulated or implemented by the agency, but instead is the result of the application of found facts to the Congressional standards set forth in the Atlantic Coastal Act and as such, the declaration does not implicate federalism in the manner contemplated by Executive Order 13132. The agency, however, has nevertheless consulted, to the extent practicable, with appropriate state and local administrative and law enforcement officials to address the principles, criteria, and requirements of E.O. 13132.

Authority: 16 U.S.C. 1801 et seq.

Dated: December 19, 2019.

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National Marine Fisheries Service.

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